IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COPPER RIVER & NORTHWESTERN RAILWAY COMPANY, a corporation,
Plaintiff in Error,

vs.

MRS. E. A. REED, as Administratrix of the Estate of J. E. REED, Deceased,
Defendant in Error.

No. 2301.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE TERRITORY OF ALASKA THIRD DIVISION.

Reply Brief of Plaintiff in Error.

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT and
LAWRENCE BOGLE,
Attorneys for Plaintiff in Error.

610 Central Building,
Seattle, Washington.

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This brief will be directed solely to the motion of defendant in error to strike certain portions of the record and the argument in support of said motion.

I.

All that portion of the motion contained on page 1 and to the middle of page 2 of the brief of defend-

ant in error will be wholly disregarded, because plaintiff in error does not, in its brief, found any exceptions or claim of error based upon such portions of the record, and it is immaterial in the decision of this cause whether the motion in that regard is granted or not.

II.

On page 3 of the brief of defendant in error, it is moved that the bill of exceptions, styled by defendant in error 'Transcript of Testimony,'' be stricken because the same is not properly authenticated as a bill of exceptions. An inspection of the certified transcript shows that the certificate of the Judge is attached to, and is a part of the bill of exceptions, and refers to the foregoing bill of exceptions to which it is attached, and contains the signature of the judge, and is therefore properly authenticated. This certificate appears on page 348 of the printed record. The motion of the defendant in error in this regard is wholly without basis of fact.

III.

On page 2, defendant in error moves to strike the motion for a directed verdict, defendant's exceptions to instructions, motion for judgment notwith-

standing the verdict, order denying motion for judgment notwithstanding verdict, motion for new trial, and order denying the same.

1. The motion for a directed verdict is set forth in full in the bill of exceptions, and the bill of exceptions shows that the same was overruled and exception allowed (Printed Record pp. 329, 331).

2. The motions for judgment notwithstanding the verdict, for a new trial, and orders denying same, are all matters of record within the statute of Alaska, and therefore it was not necessary to carry them into the bill of exceptions.

3. The exceptions to instructions given by the court were in writing and were presented to the court and allowed by the judge thereof (Printed Record p. 364).

Sections 1053 and 1055, Chapter XXI, Compiled Laws of the Territory of Alaska, 1913, provide that matters in writing and exceptions thereto which have been presented and signed by the judge become a matter of record, and therefore need not be carried into the bill of exceptions, but are matters of record which are properly certified into the transcript by the clerk. The sections referred to are as follows:

> "Sec. 1053. The point of the exception shall be particularly stated and may be delivered, in writing, to the judge, or entered in his minutes, and at the time or afterwards be corrected until made conformable to the truth."
>
> "Sec. 1055. The statement of the exception, when settled and allowed, shall be signed by the judge and filed with the clerk and thereafter it shall be deemed and taken to be a part of the record of the cause; no exception need be taken or allowed to any decision upon a matter of law when the same is entered in the journal or made wholly upon matters in writing and on file in the court."

IV.

It is earnestly insisted that it will not be necessary for this court to consider errors of the lower court which would merely go to the question of granting a new trial. The total failure to show any negligence on the part of the defendant, and the affirmative showing that the accident was caused by the negligent acts of the deceased engineer and his fireman, and that they assumed the risk of any condition which they had thus created, would seem to render it imperative that the judgment below be

reversed with instructions to dismiss the action. All the matters affecting these questions were raised on the trial below and exceptions duly taken and preserved in the bill of exceptions.

It is, however, urged that in any event the verdict returned cannot stand and a new trial must be granted regardless of the consideration of the other questions. As was noted in the opening brief of plaintiff in error, the measure of damages, and the basis for arriving at such damages, were incorrectly given by the court and were in direct violation of the rule established by the Supreme Court of the United States. This instruction regarding the measure of damages was duly excepted to. (Printed Record p. 360.) The court in direct conflict with the statute, and with the construction given the statute by the Supreme Court of the United States, charged the jury to return a gross sum, and received a verdict which did not apportion the damages between the widow and the two children of deceased. Whether excepted to or not, a judgment cannot be rendered upon such a verdict, since there is no finding by the jury upon which a verdict may stand. The personal representative in suing is not asking a judgment for the estate or for himself, but is ask-

ing a judgment for each of the beneficiaries named in the statute, and the statute makes it imperative that the verdict apportion the damages according as the parties are entitled to recover. The court trying the cause, nor any other court having jurisdiction, cannot apportion the damages returned. The administratrix takes a judgment without authority as to its distribution. The statutory action is not for the equal benefit of the surviving relatives, but the interest of each beneficiary must be measured by his or her individual, pecuniary loss. What that loss is—what the apportionment must be—is for the jury to return, and until such apportionment is made by the jury, a judgment cannot be sustained upon a verdict which is for a gross sum without any apportionment of that sum among the several surviving relatives. The administratrix is not entitled to a judgment until a verdict has been returned fixing the amount to which each of the surviving relatives is entitled so that distribution may be made by the representative according to the apportionment of the jury. The representative suing solely for the benefit of the surviving relatives, is without authority to make the distribution or recover a judgment until the verdict of the jury designates the part of the gross sum that each of the bene-

ficiaries should receive. Until there is a verdict apportioning the damages, there is no way to arrive at the determination of the jury as to the loss suffered by each beneficiary, and therefore, there is no ground upon which to base a judgment in favor of the several beneficiaries. As stated in the case of *Railway Co. vs. McGinnis,* 33 Sup. Ct. Rep. 426, "The apportionment is for the jury to return." There is no power resting elsewhere by which an apportionment can be made, and the representative is not entitled to hold a judgment until he has received a verdict apportioning the damages and thereby determining the loss sustained by each beneficiary, and the amount which such beneficiary is entitled to recover.

Respectfully submitted,

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT and
LAWRENCE BOGLE,
Attorneys for Plaintiff in Error.